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IN THE SUPREME COURT

OF THE

UNITED STATES

October Term, 1989

DAVID A. NORDSTROM, et al

Petitioners

vs.

THE STATE OF WASHINGTON, et al

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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(a)

QUESTION PRESENTED FOR REVIEW

Did the United States Court of Appeals for the Ninth Circuit commit error by ruling that the Petitioners' complaint raised federal issues that were only defenses to a state court judgment, and therefore the federal courts lacked subject matter jurisdiction?

(b)

PARTIES TO THE PROCEEDINGS

Plaintiffs named in this case were: David A. Nordstrom, Theodore H. Dahm, Robert L. Brown, Richard Wiedenhoft, James P. Kittleson, Joseph J. Ray, Harry Brookman, Malcom D. Rixon, Gaspar V. Policani (upon his demise, substituted with William A. Smith), and George Hibbs.

Defendants named in this case were: The State of Washington and the Honorable Vernon R. Pearson in his capacity as Chief Justice of the Supreme Court of Washington; U. S. Department of Defense, the Honorable Frank C. Carlucci, Secretary; U.S. Department of the Air Force, the Honorable Richard C. Aldridge Jr., Secretary; U.S. Department of the Army, the Honorable John O. Marsh Jr., Secretary, and the U. S. Department of the Navy, the Honorable William L. Bell, Secretary.

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(d)

OPINIONS DELIVERED IN THE COURTS BELOW

Notice of Hearing and Order of Dismissal with Prejudice, filed October 20, 1988 (Appendix A); Transcript of Proceedings of October 5, 1988 (Appendix B); Memorandum decision of the United States Court of Appeals for the Ninth Circuit, filed February 16, 1990 (Appendix C).

None of the decisions of the courts below are officially published.

(e)

GROUNDS UPON WHICH JURISDICTION IS INVOKED

The judgment of the United States Court of Appeals was entered on February 16, 1990. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

This Petition is docketed within ninety days of the entry of the order in the Ninth Circuit Court of Appeals.

(f)

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves a challenge to the Constitutionality of the Uniformed Services Former Spouse Protection Act, Pub. L. 97-252, codified as 10 U.S.C. 1408, which is set forth in full in Appendix E. Alternatively, this case involves the interpretation of that Act, and in particular, sub-sections (c)(1) and (c)(2), which are set out below. Sub-section (c)(1) provides:

> Subject to the limitations of this section, a court <u>may</u> treat disposable retired or retainer <u>pay</u> <u>payable</u> to a member... either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court. (Emphasis added).

Sub-section (c)(2) provides:

> Notwithstanding any other provision of law, this section does not create any right, title, or interest which can be sold, assigned, transfered, or otherwise disposed of (including by inheretance) by a spouse or former spouse.

Several other federal statutes are involved to the extent that they peripherally support Petitioners' contentions. These are set forth in full in the Appendix. These statutes are 10 U.S.C. 101(27), 29 U.S.C. 1002(32), and 29 U.S.C. 1003 (Appendix F). State statutes in apparent conflict are set out in Appendix G. Constitutional provisions are set forth in Appendix H.

///

STATEMENT OF THE CASE

Petitioners, retired members of the uniformed military services, brought an action in the United States District Court for the Eastern District of Washington alleging that the courts of the State of Washington under color of a federal statute but in contravention of federal statutory and case law, and in violation of Washington State statutory law, had discriminatorily and unlawfully diverted their current and future income. Petitioners alleged that the very law utilized by the courts of the State of Washington, specifically 10 U.S.C. 1408, is an unconstitutional act, prohibited by the United States Constitution, Article 1, Section 8, clauses 12, 13 and 14. Knickerbocker

Ice Co. v. Stewrat, 253 U.S. 149 (1920). Petitioners also alleged due process and equal protection arguments. Petitioners sought no monetary damages.

Petitioners also sought, by way of a declaratory judgment, a judicial declaration defining the legal character of military retired/retainer pay and injunctive relief. Jurisdiction was asserted pursuant to the Constitution of the United States, Article III, Sec. 2, Clause 1; and 28 U.S.C. 1331; 28 U.S.C. 1355; 28 U.S.C. 1343 (3)(4); 28 U.S.C. 1356, and 5 U.S.C. 702.

Petitioners brought before the District Court a motion to certify their complaint as a class action pursuant to Fed.R.Civ.P. 23(b)(2), and for temporary injunctive relief. Respondents, state and federal defendants below, responded by filing motions to dismiss the action.

A hearing was held on the motions to dismiss on October 5, 1988. The District Court Judge used a prior unpublished opinion in which he had ruled that the Uniform Services Spouse's Protection Act, 10 U.S.C., Section 1408, overruled McCarty v. McCarty, 453 U.S. 210 (1981), thus allowing the courts of the State of Washington to treat military retired retainer pay as deferred compensation. Therefore, he reasoned that the Petitioners failed to state a claim. He then decided that the court lacked subject matter jurisdiction. The complaint was dismissed pursuant to Fed.R.Civ.P. 12(b)(6), and Fed.R.Civ.P. 12(b)(1).

A timely appeal was taken to the United States Court of Appeals for the Ninth Circuit. The Court, in a

Memorandum Opinion filed February 16, 1990 upholding the District Court's reasoning, said that the complaint was properly dismissed for lack of subject matter jurisdiction under Fed.R.Civ.P. 12(b)(1). It affirmed the dismissal and did not reach the Fed.R.Civ.P. 12(b)(6) issue. A timely Petition for Writ of Certiorari was filed in this Court.

(h)

ARGUMENT

This case arises from the Petitioners' complaint as to the nature of the legal definition of retired/retainer pay as received by members of the United States Armed Forces placed on the roll of the retired reserves. This action is predicated on the denial of the

Petitioners' due process rights in the definition of their retired/retainer pay by the state courts, and the corresponding treatment afforded the class of persons known as "military retirees", as opposed to all other classes of persons in the State of Washington. The complaint alleges, inter alia, that the courts of the State of Washington ignore Title 10 and Title 26 of the U.S.C., their own statutes, Wash.Rev.Code Ann. 26.16.140, (Appendix C), and Wash.Rev.Code 6.16.030, now recodified as Wash.Rev.Code Ann. 6.15.020, (Appendix C), and established and extensively cited federal case law, by defining military retired/retainer pay as a "pension", as "deferred" compensation. See for example Marriage of Parks, 48 Wash.App. 166, 737 P.2d 1316 (1987).

This erroneous classification then "permits" the courts of the State of Washington, albeit in violation of R.C.W. 6.16.030 (Appendix C) and 29 U.S.C. 1003, and 29 U.S.C. 1002 (32)(Appendix B), to divide this purported "property" in dissolution of marriage actions. The complaint seeks only declaratory and injunctive relief.

Specifically the complaint seeks (1) declaratory relief as to the legal character of military retired/retainer pay, either as "wages" (current compensation), or a "pension" (deferred compensation); (2) declaratory relief that the courts of the State of Washington are unconstitutionally applying the state laws to the Petitioners and the class of persons they seek to represent; and (3) an injunction precluding the federal

agencies from honoring such decrees.

The complaint does not allege that the Washington decrees are invalid. The complaint does not allege that the State of Washington does not have the jurisdiction, right or province to regulate dissolutions of marriage for all citizens of that state. The complaint does allege that the State of Washington is discriminating against military retirees by this classification, and thereby placing them in involuntary servitude for the rest of their lifetime, in repugnance to the Thirteenth Amendment of the Constitution of the United States.

Petitioners argued at the trial court that the Uniformed Services Former Spouse Protection Act, 10 U.S.C. 1408 (hereinafter FSPA or the Act), was an unconstitutional delegation of

exclusive Congressional authority. (TP) (Appendix F).

(A) TITLE 10 U.S.C. 1408 INASMUCH AS IT DELEGATES TO THE VARIOUS STATES MATTERS EFFECTING THE COMPENSATION OF FEDEPAL MILITARY MEMBERS, IS UNCONSTITUTIONAL, IN VIOLATION OF THE UNITED STATES CONSTITUTION, ARTICLE 1, SECTION 8.

The Former Spouses' Protection Act is unconstitutional as a delegation of exclusive Congressional authority. Clearly, the raising and maintaining of the military is exclusively a function reserved by the United States Constitution to Congress. By virtue of the Constitutional reservation of authority to Congress, likewise, Congress may not delegate its responsibility. A similar question was decided in Knickerbocker Ice Company v. Stewart, 253 U.S. 149 (1920). Congress is exclusively authorized by the

Constitution to fix and address remedies for seaman injured at sea. Congress enacted legislation which provided an election of remedies for the seaman under the various laws of the various states. The Court held that the delegation of power to the states which would control or affect the Congressional schema was an unconstitutional delegation of authority by Congress.

The perpetuation of the mischaracterization of retired pay as "pension" or "deferred compensation" as is done by the courts of the State of Washington, is radically inconsistent with federal law respecting the pay. Congress alone has the power and authority to regulate pay for military service and to determine what constitutes military service for which

compensation is required or payable. United States Constitution, Article I, section 8, Clauses 12, 13, 14, and 16; United States v. Standard Oil, 332 U.S. 301 (1947) [holding personnel affairs/ pay subject exclusively to U.S. regulations]; Free v. Bland 369 U.S. 663 (1962) [holding that federal law and congressional enactments control the determination of the character of retired pay as present earnings]; McCarty v. McCarty, 453 U.S. 210 at 232 (1981).

State courts may not redefine military retired pay. Wissner v. Wissner, 338 U.S. 655 (1950). Appellant's are under contract for services and are, therefore, employees of the United States Armed Forces, continuing to serve the United States Armed Forces as officers and

non-commissioned officers on retired reserve status. Their right to receive pay or retired pay is established by federal statute. Bell v. United States, 366 U.S. 393 (1961) [holding that a soldier's entitlement to pay is dependent upon a federal statutory right]; Goodley v. United States, 441 F.2d 1175 (Ct.Cl. 1971); Costello v. United States, 442 U.S. 929 (1979) [stating "the contract seems to mean that Stevens will receive the pay authorized by statute from time to time as he performs his service"], and is a yearly appropriation by Congress in consideration for his continuing service and observance of restrictions [United States v. Larionoff, 431 U.S. 864 (1977)]. [Forfeiture of pay upon employment subject to "supervision and control" of foreign gov't; Hostinsky v.

United States, 292 F.2d 508 (Ct.Cl. 1961): [prohibition against dual officer status/pay; Hooper v. Hartman, 163 F.Supp. 437, aff'd (9th Cir., 1958) 274 F.2d 469 (Rear Admiral tried by court martial, when found guilty, forfeited right to earn retired pay)].

Other restrictions include: (a) reductions in pay if certain employment accepted (10 U.S.C. 5532); (b) forfeiture of pay for certain crimes (10 U.S.C. 8312); (c) forfeiture if employed by foreign government (U.S. Const. Art. I, sec. 9 Cl. 8); (d) forfeiture of pay for employment with defense work for private firms within three years of retirement (37 U.S.C. 801)(1); (e) recall involuntarily (10 U.S.C. 3504(a); (f) forfeiture if foreign citizenship is acquired (37 Comp.Gen. 207; 41 Comp.Gen. 715); (g) subject to UCMJ.

Congress has determined that while the military member is on an indefinite service contract with this nation, he will continue in the capacity of his "retiring" rank unless he violates the terms and conditions of his employment contract with the United States Armed Forces. Congress has expressly retained the inactive duty member and makes monthly (periodic) payments to him in consideration for his continuing (but reduced) service to the United States Armed Forces. United States v. Morton, 112 U.S. 1 (1884); United States v. Mills, 197 U.S. 223 (1904); Kahn v. Anderson, 255 U.S. 1 (1920); Leonard v. United States, 279 U.S. 40 (1928); Puglisi v. United States, 215 Ct.Cl. 86, 564 F.2d 403, cert. den. 435 U.S. 968 (1978); Lockhart v. Mittlemann, 123 F.2d 703 (2nd Cir. 1941); Andrews v. United

States, 175 Ct.Cl. 561 (1966); Chambers v. Russel, 192 F.Supp. 425 (N.D. Cal. 1961); Hooper v. Hartman, supra; United States v. Tyler, 105 U.S. 244 (1882); Costello v. United States, supra; Watson v. Watson, 424 F.Supp. 866 (E.D. N.Car. 1976); Hostinsky v. United States, supra. For over one hundred years, the federal courts have recognized and held that in the absence of a retainer paid to the military member on inactive duty status, the United States would be without right to subject the member to (1) continuing obligations and restrictions, or (2) recall to active duty, United States v. Tyler, supra.

Thus, the sustaining of retainer pay as a "personal entitlement" and the "current earnings" characterization is crucial to federal goals and objectives, United States v. Tyler, supra; Costello

v. United States, supra; 10 U.S.C. section 2771; McCarty v. McCarty, supra. Consequently, state courts are preempted from recharacterizing the pay as deferred compensation, Florida Lime & Avocado Growers, Inc., v. Paul, 373 U.S. 132 (1963); Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947).

Military retired pay is paid to the military member as a "personal entitlement" for personal services rendered to the United States Armed Forces. Wissner v. Wissner, supra; 10 U.S.C. 2771; Lemly v. United States, 75 F.Supp. 248, 109 Ct.Cl. 760 (1948); McCarty v. McCarty, supra.

There is no property right in military retired/retainer pay not yet earned. 10 U.S.C. 1408 is an unconstitutuional delegation of authority by Congress to the states.

Even so, it states:

> Notwithstanding any other provision of law, this section does not create any right, title, or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse. 10 U.S.C. 1408 (c)(2).

Indeed, the enabling provision of that statute is extremely limited in scope. It states:

> Subject to the limitations of this section, a court may treat <u>disposable</u> retired or retainer <u>pay payable</u> to a member . . . either as the property of the member or as property of the member and his <u>spouse in accordance with the law of the jurisdiction of such court</u>. 10 U.S.C 1408 (c) (1) (Emphasis Added).

That section only purports to allow the state courts to consider <u>disposable</u> income, not the gross income. It further defines it as <u>pay</u>, and only allows the state courts to consider that pay <u>payable</u>. It further only allows the

state courts to consider that pay payable as property of the member or his spouse. It further only allows the state courts to so consider such disposable pay payable to a member and/or his spouse in accordance with the laws of the state. Disposable is defined as the gross income, less taxes required to be withheld, less FICA, less union dues, if any, by Washington law, and is further defined within 10 U.S.C. Pay is defined as wages, remuneration for services. Payable is defined as that which is due and owing, which can be demanded. Spouse is defined as one's marital partner, not one's former marital partner. The laws the State of Washington prohibit the division of one's future wages. R.C.W. 26.16.140. Even though the courts may consider and divide all "property", whether community

or separate, and "while under certain circumstances [a court may] award part or all of one spouse's separate property to the other, the situations which warrant such action are exceptional". Moore v. Moore, 9 Wash. App. 951, 515 P.2d 1309 (1973). Unearned future income is not, however, property. 10 U.S.C. 1408 by its own terms, purports to permit the courts to consider that pay payable at the time of dissolution, and nothing more. 10 U.S.C. 1408 was enacted to overcome the federal preemption, albeit, unconstitutional, and nothing more, and by its own terms made no redefinition, nor created any rights that did not already exist.

State courts will be preempted upon a showing of (1) an expression of Congressional purpose or intent to preempt the field, (2) pervasiveness of

the schema, (3) nature of the field as federal in character, and (4) the inherent need for nationwide uniformity. Congress has preempted the field and has established a pervasive schema by exercising its authority pursuant to the United States Constitution, Article I, section 8, cls. 12, 13, 14, and 16; Article VI, clause 2. Accordingly, the field is exclusively federal in character, United States v. Tarble, 80 U.S. 397 (1872).

It is imperative to maintaining the stability of the armed forces that the consideration a member receives for his service is uniform and does not vary from state to state.

Given similar circumstances in the case of military pay, Appellant's urge this Court to find that FSPA is likewise unconstitutional. The FSPA specifically

delegates to each state the authority to "treat" the pay "in accordance with the laws of the State". This is precisely the issue laid to rest by the Supreme Court in Knickerbocker, supra. Where the delegation abdicates to the states a power/authority granted exclusively by the Constitution to Congress, the Act is an impermissible delegation of non-delegable power.

This Court addressed only the issue of disability compensation recieved in lieu of military retired/retainer pay in the case of Mansell v. Mansell, 490 U.S. _____, 104 L.Ed.2d 675, 109 S.Ct. 2023. This Court was not asked to address the Constitutionality of the Act itself, and properly did not do so. That time has come, the time to determine the Constitutionality of the Act.

(B) THE BASIS OF THE COURT'S DISMISSAL FOR LACK OF SUBJECT MATTER JURISDICTION UNDER FED.R.CIV.P. 12(b)(1) IS ERRONEOUS AND MUST BE REVERSED.

The standard for review of dismissal under Fed.R.Civ.P. 12(b)(1) is the clearly erroneous standard. Calhoun v. United States, 475 F.Supp.1, 3 (S.D.Cal, 1977); Sherman v. Yakaki, 549 F.2d 1287 (9th Cir. 1977); Scheuer v. Rhodes, 416 U.S. 232, 237 (1974). The trial court below, cited no basis for its dismissal, but referred only to a previous decision of his in an unpublished case (TP). In that unpublished case, the trial court below used the authority of Janakes v. United States Postal Service, 768 F.2d 1091 (9th Cir. 1985), and erred in reading the language of the case. The question is not whether the Plaintiffs could use 10 U.S.C. 1408 as a basis for coercive

action, but whether Defendants could do so. At pg. 1093, the Court states in Janakes that:

> [4] If, however, the declaratory judgment defendant could have brought a coercive action... then we have jurisdiction notwithstanding the declaratory judgment plaintiff's assertion of a federal defense... (emphasis added).

Surely, the declaratory judgment defendant, the United States Government, can use 10 U.S.C. 1408, or any other federal law, to enforce its rights. The trial court's previous reliance on the mandate of Hasbrouck v. Texaco, Inc., 663 F.2d 930, 933 (9th Cir. 1981) was faulty. Although the trial court below correctly read Hasbrouck as denying the District Courts within the Ninth Circuit the authority to overrule the decisions of the Ninth Circuit, it erroneously used Fern v. Turman, 736 F.2d 1367 (9th Cir. 1984) as its basis. This case is

clearly distinguishable from Fern. Firstly, the actions in Fern were removal actions taken from in process, active state courts actions. It is clear that the federal courts will not take an action from the state courts without allowing the action to be decided first by the states. The case at bar is not a removal action. The case at bar is not currently pending in any other court. The court in Fern stated at pg. 1369, that:

> [In Fern, s]tate court proceedings are ongoing. Until these proceedings are completed, and it has been determined that appellants must relinquish a portion of their retired pay, a decision by this court on the claims against the federal defendants would be premature... Appellants' claims against the federal defendants are therefore unfit for judicial resolution because they are contingent both upon a decision of the state court not yet final and in administrative action not yet taken.

This case cures all of the reasons given in Fern. There are no pending state court actions. Those actions are final. There are garnishments being taken. Administrative action has been taken. The case is ripe for review. There is current, immediate and devastating impact upon the Plaintiffs.

The Ninth Circuit Court belatedly published its earlier unpublished opinion in that case, Williams v. State of Washington, 894 F.2d 391 (9th Cir. 1987), on January 16, 1990, and used that decision published after argument to the court as the basis for affirmance of the dismissal in this case. Neither the trial court nor the Ninth Circuit Court addressed or acknowledged Petitioner's argument that the federal courts have jurisdiction to reverse any judgment regarding the award of federal

property in a manner that is inconsistent with federal law respecting that property. McCune v. Essig, 199 U.S. 382 (1905).

Federal statutes are to be construed to achieve uniform results throughout the nation Reconstruction Finance Corporation v. Beaver County, 328 U.S. 204, 209 (1946). Congress legislates with full awareness of the cannons of statutory construction. Lorillard v. Pons, 434 U.S. 575, 580 (1978); Cary v. Curtis, 44 U.S. 236, 240 (1845). The case at bar is ripe for review. The issue is an important one.

The state courts have absolutely no proper authority or right to garnish or "divide" Appellant's current pay for the benefit of another not their spouse, as a property right, as to do so would be repugnant to the Thirteenth Amendment of

the Constitution of the United States, by placing Appellant's in a state of involuntary servitude. Appellant's retired/retainer pay as a member of the retired reserve, is unassailable as a property right other than community property, as it only becomes "property" as it is earned. 10 U.S.C. 101(27) defines pay for all of Title 10 U.S.C. That section lists as "pay", inter-alia, basic pay, hazardous pay, retainer pay, retired pay and incentive pay. There are no differentiations. Each is a wage, earned day to day, and only payable after they are earned.

The courts are empowered with authority to issue declaratory relief, to give a definition to allow for uniform results. The uniformity sought is a declaration as to the character of military retired/retainer pay, either as

pay, as Plaintiffs contend, or as a pension, as the State of Washington contends, to permit all states then to apply that same characterization under the law of the jurisdiction. The courts are empowered to make a ruling on the constitutionality of a federal statute.

Petitioners stated a federal question, specifically, the definition of federal payments made to federal officers pursuant to federal statutes. The federal courts have jurisdiction over all civil actions arising under the Constitution, laws or treaties of the United States. 28 U.S.C. 1331. Title 10 of the United States Code states that "pay" includes basic pay, special pay, retainer pay, incentive pay, retired pay and equivalent pay. 10 U.S.C. 101(27). The United States Internal Revenue Code defines "pay" as "wages", and

specifically retired or retainer pay at 26 U.S.C. 61(a)(11). The FSPA, 10 U.S.C. 1408, does not redefine that pay. It states:

> Notwithstanding any other provision of law, this section does not create any right, title, or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse. 10 U.S.C. 1408(c)(2).

The question yet remains: is that pay current compensation, as this Court and the lower federal courts have consistently held in the past, United States v. Tyler, supra; Costello v. United States, supra; Berkey v. United States, 176 Ct.Cl. 1, 361 F.2d 983 (1966); Hooper v. Hartman, supra; Watson v. Watson, supra; Goodley v. United States, supra; or is it deferred compensation? In the McCarty decision which precipitated the FSPA, this Court

expressly declined to rule whether a state could characterize retired pay as deferred compensation. Id. at 223. Once an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law. Caterpillar v. Williams, 482 U.S. 386 (1987). The federal statutes pled by Petitioners and cited above completely pre-empt state interpretation.

Petitioners alleged that the FSPA, permits the state courts to do one and only one thing, specifically:

> Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member... either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court. 10 U.S.C. 1408 (c)(1). [Emphasis Added]

State courts thus may apply state law to the "thing" (retired/retainer pay), as defined by federal law, not redefine the "thing" in contravention of federal law. Plaintiffs alleged that 10 U.S.C. 1408 allowed the states no other latitudes.

Neither the Ninth Circuit nor this Court has revised or amplified the holding of the Ninth Circuit in Costello supra, that "retirement pay does not differ from active duty pay in its character as pay for continuing military service". Id at 427. That very definition is as alleged by Petitioners, and is ignored by the courts of the State of Washington.

As this Court so correctly stated, "[the] statutory language is straightforward: 'A member of the Army [or Air Force, or Marines, or Navy, under

corresponding statutes] retired under this chapter is entitled to retired pay...' 10 U.S.C. 3929". McCarty, supra, at 223. This Court went on to say that:

> At the least, then, the possibility that Congress intended military retired pay to be in part current compensation for those risks and restrictions suggests that states must tread with caution in this area, lest they disrupt the federal scheme. Citations omitted. Id. at 223, f.n. 16.

The FSPA (10 U.S.C. 1408(c)(1)) states that the state courts may consider retired/retainer pay payable either as property of the member or member and his/her spouse, in accordance with the laws of that state. It does not say that the state courts shall divide military pensions, regardless of when payable, in spite of the laws of the state.

The pre-emptive force of Title 10 and Title 26 of the United States Code are so powerful as to displace entirely any state action redefining the nature or character of a federally originated, defined and administered subject as the United Stated Armed Forces or the pay, entitlement or other regulation thereof. Congress alone has the power to provide and maintain the armed forces and to make rules and regulations therefore. U.S. Constitution, Article I, sec. 8, cls. 12, 13 and 14. Congress has defined military retired/retainer pay. 10 U.S.C. 101(27). The FSPA did not redefine military retired/retainer pay. The State of Washington has done so.

The standards applicable to a Fed.R.Civ.P. 12(b)(6) action, as stated in Conley v. Gibson, 355 U.S. 41 (1957)

are equally applicable to Fed.R.Civ.P. 12(b)(1) motions Calhoun v. U.S., supra; Sherman v. Yakaki, supra. Petitioners have clearly stated a federal question, suitable only to the interpretation by the federal courts. The court below has jurisdiction, and the dismissal under Fed.R.Civ.P. 12(b)(1) must be reversed.

CONCLUSION

Since the Petitioners by asserting certain facts that if proved at trial would grant them the relief sought in the Complaint, and because the United States District Court for the Eastern District of Washington did have subject matter jurisdiction over the case, the decision of that Court must be reversed and remanded for trial on the merits.

Petitioners respectfully pray that

a Writ of Certiorari issue to the United States Court of Appeals for the Ninth Circuit, remanding this case for trial on the merits.

Respectfully submitted this 15th day of May, 1990.

BENJAMIN & PERREY, P.S.

GARY H. BENJAMIN
Attorney for Petitioners

NO: 89-1841

(2)

Supreme Court, U.S.
FILED
MAY 17 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT

OF THE

UNITED STATES

October Term, 1989

DAVID A. NORDSTROM, et al

Petitioners

vs.

THE STATE OF WASHINGTON, et al

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

NOTICE OF HEARING

and

ORDER OF DISMISSAL WITH PREJUDICE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DAVID NORDSTROM,et al Plaintiff(s) vs. THE STATE OF WASHINGTON, et al Defendant(s)	NOTICE OF HEARING C-88-316-AAM

TAKE NOTICE that a proceeding in this case has been reset for the place,date and time set forth below:

DATE: OCTOBER 5, 1988	PLACE: WM. O. DOUGLAS BLDG. 25 So. 3rd St
TIME: 8:00a	Rm. 205
PROCEEDING: MOTION FOR ORDER DETERMINING THAT ACTION PROCEED AS A CLASS; MOTION FOR PRELIMINARY INJUNCTION; MOTIONS FOR DISMISSAL	

SEPTEMBER 22, 1988

JAMES R. LARSEN
Clerk of the Court
-s-

By: Pam Posada,
Deputy Clerk

TO: GARY BENJAMIN
US. ATTY(CDG)
JAMES JOHNSON

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DAVID A. NORDSTROM, THEODORE H. DAHM ROBERT L. BROWN, RICHARD WIEDENHOFT, JAMES P. KITTLESON, JOSEPH J. RAY, HARRY BROOKMAN, MALCOLM D. RIXON, WILLIAM L. SMITH, GEORGE HIBBS, Plaintiffs, vs. THE STATE OF WASHINGTON and THE HONORABLE VERNON R. PEARSON in his capacity as CHIEF JUSTICE OF SUPREME COURT OF WASHINGTON; U.S. DEPARTMENT OF DEFENSE, THE HONORABLE FRANK C. CARLUCCI III, SECRETARY; U.S. DEPARTMENT OF THE AIR FORCE, THE HONORABLE EDWARD C. ALDRIDGE JR., SECRETARY; U.S. DEPARTMENT OF THE ARMY, THE HONORABLE JOHN O. MARSH JR., SECRETARY; U.S. DEPARTMENT OF NAVY, THE HONORABLE WILLIAM L. BALL, SECRETARY, Defendants.	No. C-88-316-AAM ORDER OF DISMISSAL WITH PREJUDICE FILED IN THE U.S. DISTRICT COURT Eastern District of Washington OCT 20 1988 James R. Larson, Clerk _____ Deputy

The hearing for defendants' Motions to Dismiss and for plaintiffs Motion for Certification of Action as a Class Action and Motion for Preliminary Injunction were heard on September 30, 1988 in Spokane, Washington. Gary H. Benjamin appeared on behalf of the plaintiffs. James M. Johnson, Senior Assistant Attorney General for the State of Washington, and Robert Linnell, Assistant United States Attorney for the Eastern District of Washington, appeared on behalf of the defendants.

For the reasons stated more fully by the court at the hearing, the following is ordered:

1. Plaintiffs' Motions for Certification of Action as a Class Action, and Motion for Preliminary Injunction are hereby DENIED.

2. Defendants' Motions to Dismiss are hereby GRANTED, and this action is ordered DISMISSED WITH PREJUDICE.

3. Sanctions in the amount of two thousand five hundred ($2,500.00) dollars are hereby levied upon counsel for the plaintiffs. Upon a proper showing of cause by affidavit, One thousand (($1,000.00) dollars of this amount is to be paid to the State of Washington, and One thousand ($1,000.00) dollars is to be paid to the United States Government. Five hundred ($500.00) dollars of this levy shall be paid into the non-appropriated fund of the Court. As a minimum, counsel for the plaintiffs shall be personally responsible for the payment of One thousand two hundred fifty ($1,250.00) dollars and he can seek to have the plaintiffs pay the remaining One thousand two hundred fifty ($1,250.00)

dollars. However, counsel for the plaintiffs is responsible for full payment of the terms of Two thousand five hundred ($2,500.00) dollars which shall be paid within thirty (30) days of the entry of this order.

IT IS SO ORDERED. The Clerk is directed to enter this order and forward copies to counsel.

DONE BY THE COURT this 19th day of October, 1988.

ALAN A. McDONALD

United States District Judge

APPENDIX B

TRANSCRIPT OF PROCEEDINGS: DEFENDANTS' MOTION TO DISMISS AND PLAINTIFFS' MOTION FOR CERTIFICATION OF ACTION AS A CLASS ACTION AND MOTION FOR PRELIMINARY INJUNCTION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DAVID A. NORDSTROM, THEODORE H. DAHM ROBERT L. BROWN, RICHARD WIEDENHOFT, JAMES P. KITTLESON, JOSEPH J. RAY, HARRY BROOKMAN, MALCOLM D. RIXON, WILLIAM L. SMITH, GEORGE HIBBS, Plaintiffs, vs. THE STATE OF WASHINGTON and THE HONORABLE VERNON R. PEARSON in his capacity as CHIEF JUSTICE OF SUPREME COURT OF WASHINGTON; U.S. DEPARTMENT OF DEFENSE, THE HONORABLE FRANK C. CARLUCCI III, SECRETARY; U.S. DEPARTMENT OF THE AIR FORCE, THE HONORABLE EDWARD C. ALDRIDGE JR., SECRETARY; U.S. DEPARTMENT OF THE ARMY, THE HONORABLE JOHN O. MARSH JR., SECRETARY; U.S. DEPARTMENT OF NAVY, THE HONORABLE WILLIAM L. BALL, SECRETARY, Defendants.	No. C-88-316-AAM October 5, 1988 Yakima, Washington FILED IN THE U.S. DISTRICT COURT Eastern District of Washington JAN 03 1989 James R. Larson, Clerk _____ Deputy

TRANSCRIPT OF PROCEEDINGS:

DEFENDANTS' MOTION TO DISMISS AND

PLAINTIFFS' MOTION FOR CERTIFICATION

OF ACTION AS A CLASS ACTION AND MOTION

FOR PRELIMINARY INJUNCTION

BEFORE HONORABLE ALAN A. McDONALD,
JUDGE

APPEARANCES:

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October 5, 1988
Yakima, Washington

TRANSCRIPT OF PROCEEDINGS

THE COURT: Good morning.

MR. LINNELL: Good morning, Your Honor.

(CLERK CALLS THE CASE)

THE COURT: If the parties are ready, they may proceed. Do so mindful of the fact that the Court has reviewed in depth the submissions on either side and also the local rule which limits argument to 15 minutes on a side.

MR. BENJAMIN: Thank you very much, Your Honor. May it please the Court and Counsel: For the record, my name is Gary Benjamin, Benjamin & Perrey, P.S. in Spokane. I represent David Nordstrom and the class of persons that he seeks to represent in this action. As the Court is well aware, the crux of this action is

the characterization of military retired-retainer pay. We're seeking to have this certified as a class, because there are upwards of 10,000 or so members in this State who are affected by the acts of the courts in the State of Washington which the Plaintiffs submit are both unconstitutional and discriminatory. Washington courts are not free to change the characterization of military retired pay.

The United States Supreme Court decided in McCarty v. McCarty, at 453 U.S. 210, military retired pay was a personal entitlement to the military member and the states' courts were preempted from dividing that pay. The Court did not decide in that case and in fact declined to rule on the remaining question of whether or not the states could recharacterize the pay from current

earnings to deferred compensation, and that is the issue that we bring before the Court. The Supreme Court in McCarty did, however, confirm the characterization of over 100 years of case law, that it was a personal entitlement; that it was current earnings, and those characterizations are still valid. In that regard, the McCarty case was merely a statement of what the law had always been. Federal Courts have jurisdiction to reverse any judgment regarding the award of Federal property in a manner that's inconsistent with Federl law respecting that property. That's McCune v. Essig case, 199 U.S. 382.

Perpetuation of the mischaracterization of retired pay as a pension or its deferred compensation is radically inconsistent with Federal law

respecting that pay. The Washington Court decisions conflict with the Federal statutory scheme and for raising and supporting military forces. Congress alone has the power and authority to regulate pay for military service and determine what constitutes military service for which compensation is required or is payable. State courts may not redefine military retired pay. The Supreme Court has so stated in the Wissner v. Wissner case, 338 U.S. 655.

Plaintiffs here are under contract for services and are therefore employees of the Untied States Armed Forces. They are now separated from active duty and continuing to serve in the United States Armed Forces on inactive duty status in the retired reserve. Their "right," if we can put it in quotes, to receive retainer pay or retired pay is

established by Federl statute. It is a yearly appropriation of Congress and the Larionoff case, United States v. Larionoff, 431 U.S. 864, is the best reference for that, and is in consideration for their continuing service in observance and restrictions. Congress has determined that while the military member is on the indefinite at service, he will continue in the capacity of his retirement rank unless he violates the terms of it. Congress has expressly retained the inactive members and makes periodic monthly payments to them in consideration for their continuing service. The Supreme Court, for over 100 years, has recognized that in the absence of a retainer pay to the military on inactive status, the United States would be without the right to subject the member to the continuing obligations,

restrictions, or recall; and it goes back to U.S. v. Tyler, back in 1881. Retired pay is a personal entitlement as current earnings; it is crucial to the Federal goals and objectives.

State courts are preempted from recharacterizing the pay as deferred compensation. Similar issues have been decided in the Florida Lime & Avocado Growers, Inc. v. Paul, which is at 373 U.S. 132, and the Rice v. Sante Fe Elevator Corp., which is 331 U.S. 218.

Military retired pay is paid as a personal entitlement for personal services rendered to the United States Government. State courts are preempted on a showing of Congressional purpose or intent, pervasiveness of the Federal scheme, the nature of the field as Federal in character, the inherent need for nationwide uniformity. Congress has

preempted the field and established a pervasive scheme by exercising its authority pursuant to the United States Constitution, Article 1, Section 8, Clauses 12, 13 and 14; also Clause 16, Article 6, Section 2. The field is exclusively Federal in character. It is imperative to maintaining stability of the Armed Forces that the consideration the member receives for his service does not vary from state to state; and that's exactly the situation we have today. Washington courts destroy the stability by allowing retroactive application of the Former Spouses' Protection Act, which we will call FSPA, and it created diversity of application of the Federal statute between the states. The Arizona courts, for example, in the Edsall case, 693 P.2d 895, did not allow retroactive application which Washington courts do.

The Former Spouses' Protection Act is unconstitutional. It is a delegation of the exclusive congressional authority. Clearly the raising and maintaining of the military is an exclusive function reserved to Congress by the Constitution of the United States. By virtue of that reservation of authority, Congress may not delegate that authority. A similar question, precisely on point, was decided in Knickerbocher Ice Co. v. Stewart, to be found at 253 U.S. 149. Congress is exclusively authorized by the Constitution to fix and address remedies for seamen injured at sea. That was the subject of the Knickerbocher case. Congress subsequently enacted legislation which provided for an election of remedies for seamen under the various laws of the various states. The Supreme Court in Knickerbocher stuck that down

nd said that delegation of power to the states which would control or affect a congressional scheme was an unconstitutional delegation of authority by Congress. We would submit that's exactly what's happened here.

Given similar circumstances in the case of military pay, Plaintiffs urge this Court to find that the Former Spouses' Protection Act is unconstitutional. It specifically delegates to each state the authority to treat the pay in accordance with the laws of the state. That's the precise action the Knickerbocker court said they could not do for the delegation abdicates to the states that power and authority granted by the Constitution to Congress -- the act is impermissible -- is a delegation of a nondelegable power. The modification of final judgments that

takes place in the Washington courts is unconstitutional and in violation of the Fourteenth Amendment as well.

At the time each of these Plaintiffs entered active duty in the United States Armed Forces, at the time they signed a written contract for an indefinite service with the United States Armed Forces and applied for and were granted status under the Retired Reserve rules, military retired pay was a personal entitlement of the military member. That's the Wissner case that I referred to earlier, as well as McCarty. The Washington courts have routinely permitted relitigation of property claims based on retired pay. Based solely on these impermissible actions which apply the FSPA -- which we submit is unconstitutional -- and applying it retroactively, a former spouse of one of

these Plaintiffs obtains judgment for up to 50 percent of the Plaintiff's future wages, specifically of their retired pay.

These judgments are predicated on the false premise that the parties were tenants in common sharing an equal but undivided interest in the military retired benefits accrued from the date of the marriage until the date of separation. The falsity is that there is no accrued benefit. This alleged tenants in common interest supposedly commenced running from the day of their marriage by viture [sic] of the community property laws in the State of Washington, but it wasn't until February 1st of 1983, when the Former Spouses' Protection Act came into being, that the Washington Courts had any purported authority at all to apply community property law to retired or retainer pay. Thus, the earliest

possible date that these Plaintiffs could have taken any action to protect their personal entitlement was February 1st, 1983. The taking of their property, however, occurred months and years earlier than that. The unconstitutional effect is very simple.

The Fourteenth Amendment of the Constitution provides and guarantees that no state shall deprive a person of life, liberty or property without due process of law. Clearly, it's not constitutionally permissible to pass a law in 1983 that transforms conduct taken prior to 1983 into a loss of property rights. They've had no notice to be heard at the time of this so-called -- or this purported conversion of their pay to an alleged community property interest.

The Supreme Court has held forever, since Pennoyer v. Neff, that notice is

necessary. No notice could possibly have been given when the Act is applied retroactively. The retroactive application violates the Constitution which prohibits that it impairs vested property rights, if you, you know, call it property. Former Uniform -- the FSPA was not made retroactive to apply to dissolution decrees. The Congressional Record shows that Congress considered that, but they did not do so, for to do so would have violated the ex post facto limitations in the United States Constitution. The Congressional Record clearly shows that they intended not to do that, and that can be found in the Senate Report 97-502 at pages 1599 to 1600. "If Congress has weighed the matter, it is not the province of the State Courts to strike a different balance," and that's a quote out of

Hisquierdo that we're all familiar with.

THE COURT: You have one minute, Counsel.

MR. BENJAMIN: Yes, Your Honor.

The conclusion in this case is really relatively simple. We're here today asking this Court to certify this as a class so that we can be heard on the merits of the case to get a definition that was not given in the McCarty decision. It was specifically reserved in the McCarty decision. The time is right for review of that issue. We would ask this Court to certify this as a class, issue a preliminary injunction as previously prayed for until the matter can be heard on the merits.

Thank you very much, Your Honor. I would like the opportunity to respond briefly --

THE COURT: Well, you don't have any

time left to do that.

MR. BENJAMIN: Thank you.

THE COURT: I'll hear from the Defendants.

MR. JOHNSON: Your Honor, I'm James Johnson with the Washington State Attorney General's office representing the State of Washington and Vernon Pearson as Chief Justice. Also, here with me is Bob Linnell of the U.S. Attorney's office, who is separately representing the United States, Defendants. We are both opposing the preliminary injunction sought today. We argue it in the context of our properly noted motions to dismiss the case in its entirety. Since one part of the preliminary injunction test is the probability of prevailing on the merits, I shall argue only briefly on that single issue -- the merits of this case. We

hope we have exxentially [sic] accelerated to a hearing on the merits by noting these motions to dismiss, because this is the second time each issue in this case is before this Court.

I have appended as Appendix B to my brief, the earlier judgment in the Williams case, and I make one correction to my brief, Your Honor. At page 6 I said that this Court had not previously dealt with the class action, but in fact this Court did deal with each issue, including the class action in the prior order, denying the class action as mooting the prior action. This Court concluded at page 3 -- again, it's appended as Exhibit B: "In the face of clear Congressional intent and authority in this matter, the Court cannot grant Plaintiffs' requested relief," end quote, and it is that portion of this Court's

prior judgment -- and the judgment in its entirety was affirmed by the Ninth Circuit -- it is that portion of the judgment denying relief for failure to state a claim which we believe is fatal to the action before you this morning.

We firmly believe that Plaintiffs should have their day in court, but these Plaintiffs, Your Honor, have had at least two days in court, and this is our res judicata argument from the State. First, each and every one of these Plaintiffs had had their opportunity to litigate these questions in State divorce courts, and that, presumably, is why they've sued our Chief Justice. Some of them have appealed; some of them have not, but none of them have apparently appealed these issues to the U.S. Supreme Court.

Secondly, many of the same parties were before the Court in the Williams

case, and the very same issues are raised. I think a comparison of the complaints as I have done will show the exact same issues were addressed by this Court. Plaintiffs, of course, then appealed, and the Ninth Circuit affirmed this Court's determination that there was no claim, and, unfortunately, the United States Supreme Court review was sought too late. All this is appended to either my brief or Mr. Benjamin's. I do note in passing, Your Honor, that is was denied because it was filed too late, but a very similar claim was raised in the Armstrong Ninth Circuit case, in which a timely petition for cert. was filed and that was denied by the U.S. Supreme Court in 464 U.S. 933, apparently -- or affirming the same conclusion by the Ninth Circuit this Court had reached, that there was not jurisdiction to address such a claim.

We believe, then, that this Court cannot let them start this case again. It is barred by the two prior judgments -- the state court actions for each of them in their divorce decrees; and secondly, by the judgment in the Williams case.

Finally, if not so, we do argue that they cannot sue the Chief Justice of the State of Washington in this action, as to whom there is no claim in any event, since he is also free from -- this Court does not have jurisdiction for a claim against the Chief Justice of the State of Washington. It is an accurate statement of law and fatal to the complaint of the Plaintiffs, is found at page 4 of their brief, Your Honor. They say: "From the U.S. Supreme Court through every Federal Court, military retirement pay is dependent upon statutory right

rather than common law rules governing private contracts." This is an accurate statement of the law.

I remember when I was an officer in the Army, I was told that retirement is not subject to divorce, but that law was changed. Now, as this Court has previously noted, the U.S. Supreme Court in McCarty said, "retirement pay is not subject to divorce," but the simple answer is: Congress changed that; and the simple answer to these Plaintiffs is the remedy for them is where the McCarty losers found the remedy, and that's in Congress or perhaps in the Washington Legislature. To reiterate the conclusion, the courts do not have authority to legislate in this matter.

So to conclude, Your Honor, this Court correctly analyzed the law before it in Williams. There is nothing in this

complaint that is different from the law in Williams, and therefore either under principles of res judicata, or recognizing the prior correct analysis, the case should be dismissed in it entirety. In any event, we believe they cannot sue our Chief Justice. So the Court should dismiss the claim as you did in Williams, or at the very least, deny the preliminary injunction sought here because there's absolutely no probability of their prevailing on the merits, and I probably ought make one mention if the Court is considering at all a preliminary injunction: Not only is there such a tiny probability of prevailing on the merits, Your Honor, but in any reasonable balancing, an injunction sought here which would cut off payments to those who have prevailed in litigation against these Plaintiffs, it seems to me that the

balancing of hardships tips very sharply in favor of the spouses here.

Finally, we have sought terms for this action. We think since it has been previously dismissed and appeals have been exhausted, that is can only be characterized as frivolous. I have not prepared an order, Your Honor, but I'd be glad to prepare an order, of I with the U.S. Attorney, at your direction.

THE COURT: Mr. Linnell, do you wish to be heard:

MR. LINNELL: Your Honor, we have nothing to add to Counsel's remarks or to our supporting memorandum.

THE COURT: Before this Court for a second time are issues and arguments which leave the Court with a woeful sense of de ja vu. This is nothing more than a thinly disguised replay of an effort that proved futile when it was before this

Court two years ago. The names may be changed somewhat, but certainly not to protect the innocent.

This action is brought on behalf of the same Plaintiffs or their virtually identical clones, who, had this Court been inclined to certify the class when requested to do so the first time, would have included these very same Plaintiffs. The change in the Defendants reflects nothing more than the succession, particularly at the level of the Chief Justice of the Supreme Court of the State of Washington. The same arguments are furnished on the same issues which this Court felt were clearly resolved by Congress after the McCarty case, in language that was explicit and capable of being clearly understood.

In any event, all of these arguments were presented in one form or

another; they've not changed any. There is no real difference between lambs and little sheep, and the Court ruled on all of them, pointing out if there was ever an area in which Congressional deference was required, it certainly had to be in the area of military pay. This Court ruled that the action could not be here; that there was no original jurisdiction, and gave other valid reasons, all of which are clearly reflected in its previous opinion. These Defendants, some of whom have appealed or have seen not fit to appeal the state court decisions in their divorce actions and raising or not raising these issues, appealed the decision of this Court; and the Ninth Circuit summarily affirmed the decision.

The Court feels very clearly that in light of not once but twice but three strikes, this matter will be dismissed on

all grounds urged for its dismissal. Now that doesn't quite end the matter. The Court has reviewed this morning a Rule 11, which addresses the bringing of matters that are not well grounded in fact, which are not warranted by exisitng [sic] law, and which do not reflect a good faith argument for the extension, modification, or reversal of existing law, and which do not reflect a good faith argument for the extension, modification, or reversal of existing law. The Court feels that if there is ever an action brought that frames those concerns for courts with crowded dockets and sorely needed time for legitimate inquiries, it's the case at bar.

The Court is going to impose sanctions of $2,500, $1,000 of which shall be awarded to the State of Washington as attorney's fees, $1,000 of

which shall be awarded to the Federal Government as attorney's fees, and $500 of which shall be contributed to the unappropriated fund of this District. The Court will permit Counsel to offset 50 percent of that among his clients. He is to pay the rest without laying it off, and is responsible for the payment of the entire amount. The Court will require that that be accomplished within 30 days of this date.

(Hearing concluded).

C E R T I F I C A T E

I, KAY BLANKENSHIP, the undersigned, do hereby certify and state:

That I am an Official Court Reporter in the United States District Court for the Eastern District of Washington; that the foregoing is a true and correct transcription of the proceedings held on the date and at the time and place set forth on the cover sheet of this volume, and that said transcription was reduced to writing under my direction and control.

WITNESS my hand and seal this 30th day of December, 1988.

KAY BLANKENSHIP

Official Court Reporter

APPENDIX C

MEMORANDUM DECISION

OF THE COURT OF APPEALS

FOR THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID A. NORDSTROM, et al., Plaintiffs-Appellants, vs. THE STATE OF WASHINGTON, et al., Defendants-Appellees.	No. 88-4318 D.C. No. CV-88-316-AAM MEMORANDUM* FILED FEB 16 1990 CATHY A. CATTERSON, CLERK U.S. COURT OF APPEALS MAR 29 1990 CATHY A. CATTERSON

Appeal from the United States District Court for the Eastern District of Washington
Alan A. McDonald, District Judge, Presiding

Argued and Submitted:
December 6, 1989
Seattle, Washington

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Before: WALLACE, PREGERSON, and NELSON, Circuit Judges.

Appellant David A. Nordstrom appeals the district court's dismissal of his action for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. He also appeals the district court's imposition of a $2,500 Rule 11 sanction against his counsel. Appellant, along with nine other plaintiffs, sought a declaratory judgment defining the legal character of military retirement pay as "current wages" so as to invalidate those portions of Washington State divorce decrees that had awarded a percentage of this pay to plaintiff's former wives as community property. We agree with the district court's determination that it had no subject matter jurisdiction over this claim. We therefore affirm the

dismissal of the action. We reverse and vacate, however, the sanction order on the ground that the district court failed to provide appellant's counsel with notice and an opportunity to be heard prior to the imposition of sanctions.

I. BACKGROUND

Appellant David A. Nordstrom is a retired member of the Military who is subject to a final Washington decree of dissolution of marriage granting part of his military retirement pay to his former spouse. Appellant, along with nine other similarly situated military retirees, brought this action in the U.S. District Court of the Eastern District of Washington against the State of Washington, the Chief Justice of the Washington Supreme Court, the United States, and various Secretaries of the Departments of the United States Army,

Navy, and Air Force who were responsible for distributing the retirement pay. Nordstrom and the others sought: (1) a declaratory judgment defining the character of military retirement pay and invalidating the Washington decrees of dissolution of marriage; (2) a finding that Washington State courts are unconstitutionally applying the state law of Washington; and (3) an injunction directing the federal service secretaries not to disburse military retirement pay in accordance with the allegedly invalid Washington divorce decrees.

District court Judge Alan A. McDonald dismissed the claims for lack of subject matter jurisdiction based on a previous decision he rendered in a similar case affirmed by the Ninth Circuit in an unpublished dispostion. Williams v. State of Washington, No.

C-86-848-AAM (E.D. Wash. Jan. 26, 1987, affirmed, 833 F.2d 1018 (9th Cir. 1987). In that case, presented to Judge McDonald by the same attorney who represents appellant in the present action, Judge McDonald dismissed the claims for lack of subject matter jurisdiction. In dismissing the present action, Judge McDonald found that appellant's counsel presented the same issues and arguments that Judge McDonald had earlier resolved in Williams. It was this similarity between the cases that led the judge to impose sanctions upon appellant's counsel pursuant to Fed.R.Civ.P.11. The Williams disposition affirming Judge McDonald's decision has now been published. See Williams v. State of Washington, No. 87-3709 (9th Cir. Jan. 16, 1990).

II. DISCUSSION

A. Jurisdictional Bar

The notice of appeal in this case was filed on October 28, 1988, and named "David A. Nordstrom, et al." as appellants. Federal Rule of Appellate Procedure 3(c) requires, inter alia, that "[t]he notice of appeal shall specify the party or parties taking the appeal." A failure to comply with this requirement results in a jurisdictional bar to the appeal for those not specifically named in the notice of appeal. Meehan v. Couinty of Los Angeles, 856 F.2d 102, 105 (9th Cir. 1989) (citing Torres v. Oakland Scavenger Co., 108 S.Ct. 2405, 2409 (1988)). The use of the phrase "et al." to designate appeallants other than the named party in a notice of appeal does not satisfy Fed.R.App.P. 3(c). Torres, 108 S.Ct. 2409; Meehan, 856 F.2d at 105.

Since David A. Nordstrom was the only appellant specifically named in the

notice of appeal, this appeal is valid only as to him. Although additional parties participated in the suit at the trial level, they were merely designated by the phrase "et al." in the notice of appeal. Therefore, their participation in this appeal is jurisdictionally barred by Fed.R.App.P. 3(c).

B. Subject Matter Jurisdiction

We review de novo the existence of subject matter jurisdiction. Williams v. State of Washington, No. 87-3709, slip. op. 495, 496 (9th Cir. Jan. 16, 1990). In Williams, we held that a complaint challenging a state court classification of military retirement pay as community property and subject to division as a part of a decree of dissolution of marriage does not state a federal question for purposes of establishing subject matter jurisdiction. Id. This

holding was based in the well-pleaded complaint rule. Id.

Williams is the latest decision in a line of Ninth Circuit opinions on this issue. See Fern v. Turman, 736 F.2d 1367 (9th Cir. 1984), cert. denied, 469 U.S. 1210 (1985); Whittington v. Whittington, 733 F.2d 620 (9th Cir. 1984); Armstrong v. Armstrong, 696 F.2d 1237 (9th Cir.), cert. denied, 464 U.S. 933 (1983). In those cases, we established that the proper course in challenging state court divorce decrees characterizing military pay is to assert claims of federal preemption and unconstitutionality as affirmative defenses in state court actions. Williams, slip op. at 496; Fern, 736 F.2d at 1369; Whittington, 733 F.2d at 621. We held that federal review of these claims is properly sought through an appeal [1] from the state court

judgment to the United States Supreme Court. Whittington, 733 F.2d at 621.

[1] Pursuant to the 1988 amendment of 28 U.S.C. § 1257, Supreme Court review may now be obtained only through a writ of certiorari. See 28 U.S.C.A. § 1257(a) (West Supp. 1989).

In addition, we have held that a request for declaratory relief does not transform the state defense into a federal question. Armstrong, 696 F.2d at 1238. We emphasizeed in Williams that the federal preemption and unconstitutionality claims raised in an attack on a state court's characterization of military retirement pay have validity only as defenses to the state court judgment. Williams, slip op. at 497. They are therefore not claims arising under the laws of the United States. Fern, 736 F.2d at 1369 (citing Whittington, 733 F.2d 620; Armstrong, 696 F.2d 1237). Accordingly, in Williams,

Fern, Whittington, and Armstrong, we held that there was no subject matter jurisdiction.

Appellant Nordstrom argues that because his case is "ripe for review," these cases are not controlling. We rejected an identical argument in Williams, finding it "unpersuasive." Williams, slip op. at 497. We find the present case indistinguishable from the Williams case and therefore hold that the district court properly dismissed appellant's claims for lack of subject matter jurisdiction. We need not address the other arguments raised by appellant because lack of subject matter jurisdiction alone is a sufficient ground to dismiss a complaint under Fed.R.Civ.P. 12(b)(1).

C. Sanctions

The district court imposed a $2,500

sanction against appellant's counsel pursuant to Fed.R.Civ.P. 11.[2] In imposing this sanction, Judge McDonald stated: "The court feels that if there is ever an action brought that frames [Rule 11's] concerns for courts with crowded dockets and sorely needed time for legitimate inquiries, it's the case at bar."

We have held that procedural due process requires both notice and an opportunity to be heard before a court may sanction an attorney pursuant to Rule 11. Tom Growney Equip. v. Shelley Irrigation Dev., 834 F.2d 833, 835-36 (9th Cir. 1987).

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[2] Of this amount, $1,000 was awarded to the State of Washington as attorney's fees, $1,000 was awarded to the federal government as attorney's fees, and the remaining $500 was to be contributed to the unappropriated fund of the district court.

In the present case, the record indicates that these procedural due process requirements were not met. As in Tom Growney, the court imposed sanctions on appellant's attorney without giving him notice of its intention to do so and without giving him an opportunity to explain the allegedly improper filings. Therefore, we reverse and vacate that portion of the district court's order that imposed sanctions of appellant's counsel.

AFFIRMED IN PART and VACATED IN PART.

INTERNAL USE ONLY: CIVATT
Proceedings include all events. 88-4318
Nordstrom, et al v. State of Washington, et al

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v.

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Defendant-Appellee

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INTERNAL USE ONLY: CIVATT
Proceedings include all events. 88-4318
Nordstrom, et al v. State of Washington, et al

VERNON R. PEARSON, in his capacity as Chief Justice of the Supreme Court of Washington
Defendant-Appellee

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DEPARTMENT OF THE AIR FORCE
Defendant-Appellee

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EDWARD C. ALDRIDGE, JR., Secretary
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UNITED STATES DEPARTMENT OF THE ARMY
Defendant-Appellee

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UNITED STATES DEPARTMENT OF THE NAVY
Defendant-Appellee

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JOHN O. MARSH, JR., Secretary
Defendant-Appellee

Carroll D. Gray, AUSA
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WILLIAM L. BALL, Secretary
Defendant-Appellee

Carroll D. Gray, AUSA
(See above)
[COR LD NTC aus]

Docket as of February 1, 1990 12:44 am
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APPENDIX D

MANDATE FROM THE

NINTH CIRCUIT COURT OF APPEALS

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID A. NORDSTROM, et al., Plaintiffs-Appellants,	)	
v.	)	No. 88-4318
THE STATE OF WASHINGTON, et al., Defendants-Appellees.	)	D.C. No. CV-88-316-AAM

APPEAL from the United States District Court for the Eastern District of Washington (Spokane)

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of Washington (Spokane) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court,

that the _____ judgment of the said District Court in this Cause be, and hereby is AFFIRMED in Part and VACATED in Part.

A TRUE COPY
ATTEST MAR 29 1990
CATHY A. CATTERSON
Clerk of Court

by: -s-
DEPUTY CLERK

This certification constitutes the mandate of the Court.

Filed and entered February 16, 1990

APPENDIX E

10 U.S.C. 1408

THE "FSPA"

TITLE 10 UNITED STATES CODE

GENERAL MILITARY LAW, SUBT. A

CH. 71 COMPUTATION OF RETIRED PAY

1408. Payment of retired or retainer pay in compliance with court orders

(a) In this section:

(1) The term "Court" means—

(A) any court of competent jurisdiction of any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands;

(B) any court of the United States (as defined in section 451 of Title 28) having competent jurisdiction; and

(C) any court of competent jurisdiction of a foreign

country with which the United States has an agreement requiring the United States to any court order of such country.

(2) The term "Court order" means a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree (including a decree Modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such previously issued decree), which-

(A) is issued in accordance

with the laws of the jurisdiction of that court;

(B) provides for-

(i) payment of child support (as defined in section 462(b) of the Social Security Act (42 U.S.C. 662(b)));

(ii) payment of alimony as defined in section 462(c) of the Social Security Act (42 U.S.C. 662(c))); or

(iii) division of property (including a division of community property); and

(C) in the case of a division of property specifically provides for the payment of an amount, expressed in dollars or as a percentage of disposable retired or retainer

pay, from the disposable retired or retainer pay of a member to the spouse or former spouse of that member.

(3) The term "Final decree" means a decree from which no appeal may be taken or from which no appeal has been taken within the time allowed for taking such appeals under the laws applicable to such appeals, or a decree from which timely appeal has been taken and such appeal has finally been decided under the laws applicable to such appeals.

(4) The term "Disposable retired or retainer pay" means the total monthly retired or retainer pay to which a member is entitled less amounts which-

(A) are owed by that member to the United States;

(B) are required by law to be and are deducted from the retired or retainer pay of such member, including fines and forfeitures ordered by courts-martial, Federal employment taxes, and amounts waived in order to receive compensation under title 5 or title 38;

(C) are properly withheld for Federal, State or local income tax purposes, if the withholding of such amounts is authorized or required by law and to the extent such amounts withheld are not greater than would be authorized if such member claimed all dependents to which he was entitled;

(D) are withheld under section

3402(i) of the Internal Revenue Code of 1986 (26 U.S.C. 3402(i)) if such member presents evidence of a tax obligation which supports such withholding;

(E) in the case of a member entitled to retired pay under chapter 61 of this title, are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list); or

(F) are deducted because of an election under chapter 73 of

this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired or retainer pay is being made pursuant to a court order under this section.

(5) The term "Member" includes former member.

(6) The term "Spouse or former spouse" means the husband or wife, or former husband or wife, respectively, of a member who, on or before the date of a court order, was married to that member.

(b) For the purposes of this section-

(1) service of a court order is effective if-

(A) an appropriate agent of the Secretary concerned designated for receipt of

service of court orders under regulations prescribed pursuant to subsection (h) or, if no agent has been so designated, the Secretary concerned, is personally served or is served by certified or registered mail, return receipt requested;

(B) the court order is regular on its face;

(C) the court order or other documents served with the court order identify the member concerned and include, if possible, the social security number of such member; and

(D) the court order or other documents served with the court order certify that the

rights of the member under the Soldiers and Sailors' Civil Relief Act of 1940 (50 U.S.C. App. 501 et seq.) were observed; and

(2) a court order is regular on its face if the order-

(A) is issued by a court of competent jurisdiction;

(B) is legal in form; and

(C) includes nothing on its face that provides reasonable notice that it is issued without authority of law.

(c) (1) Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either a property solely of the member or as property of the member

and his spouse in accordance with the law of the jurisdiction of such court.

(2) Notwithstanding any other provision of law, this section does not create any right, title, or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse.

(3) This section does not authorize any court to order a member to apply for retirement or retire at a particular time in order to effectuate any payment under this section.

(4) A court may not treat the disposable retired or retainer pay of a member in the manner described in paragraph (1) unless the court

has jurisdiction over a member by reason of (A) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the territorial jurisdiction of the court, or (c) his consent to the jurisdiction of the court.

(d) (1) After effective service on the Secretary concerned of a court order providing for the payment of child support or alimony or, with respect to a division of property, specifically providing for the payment of an amount of the disposable retired or retainer pay from a member to the spouse or a former spouse of the member, the Secretary shall make payments (subject to the limitations of this

section) from the disposable retired or retainer pay of the member to the spouse or former spouse in an amount sufficient to satisfy the amount of child support and alimony set forth in the court order and, with respect to a division of property, in the amount of disposable retired or retainer pay specifically provided for in the court order. In the case of a member entitled to receive retired or retainer pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date of effective service. In the case of a member not entitled to receive retired or retainer pay on the date of the effective service of the court order, such payments

shall begin not later than 90 days after the date on which the member first becomes entitled to receive retired or retainer pay.

(2) If the spouse or former spouse to whom payments are to be made under this section was not married to the member for a period of 10 years or more during which the member performed at least 10 years of service creditable in determining the member's eligibility for retired or retainer pay, payments may not be made under this section to the extent that they include an amount resulting from the treatment by the court under subsection (c) of disposable retired or retainer pay of the member as property of the member or property of the member and his

spouse.

(3) Payments under this section shall not be made more frequently than once each month, and the Secretary concerned shall not be required to vary normal pay and disbursment cycles for retired or retainer pay in order to comply with a court order.

(4) Payments from the disposable retired or retainer pay of a member pursuant to this section shall terminate in accordance with the terms of the applicable court order, but not later than the death of the member or the date of death of the spouse or former spouse to whom payments are being made, whichever occurs first.

(5) If a court order described in paragraph (1) provides for a

division of property (including a division of community property) in addition to an amount of child support or alimony or the payment of an amount of disposable retired or retainer pay as a result of the court's treatment of such pay under subsection (c) as property of the member and his spouse, the Secretary concerned shall pay (subject to the limitations of this section) from the disposable retired or retainer pay of the member to the spouse or former spouse of the member, any part of the amount payable to the spouse or former spouse under the division of property upon effective service of a final court order of garnishment of such amount from such retired or retainer pay.

(e) (1) The total amount of the disposable retired or retainer pay of a member payable under subsection (d) may not exceed 50 percent of such disposable retired or retainer pay.

(2) In the event of effective service of more than one court order which provide for payment to a spouse and one or more former spouses or to more than one former spouse, the disposable retired or retainer pay of the member shall be used to satisfy (subject to the limitations of paragraph (1)) such court orders on a first-come, first-served basis. Such court orders shall be satisfied (subject to the limitations of paragraph (1)) out of that amount of disposable retired or retainer pay

which remains after the satisfaction of all court orders which have been previously served.

(3) (A) In the event of effective service of conflicting court orders under this section which assert to direct that different amounts be paid during a month to the same spouse or former spouse of the member, the Secretary concerned shall-

(i) pay to that spouse from the members disposable retired or retainer pay the least amount directed to be paid during that month by any such conflicting court order, but not more than the amount of disposable

retired or retainer pay which remains available for payment of such court orders based on when such court orders were effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4);

(ii) retain an amount of disposable retired or retainer pay that is equal to the lesser of-

(I) the difference between the largest amount required by any conflicting court order to be paid to the spouse or former spouse and the amount payable to the spouse or former spouse

under clause (i); and;

(II) the amount of disposable retired or retainer pay which remains available for payment of any conflicting court order based on when such court order was effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4); and

(iii) pay to that member the amount which is equal to the amount of that member's disposable retired or retainer pay (less any amount paid during such month pursuant to legal process served

under section 459 of the Social Security Act (42 U.S.C. 659) and any amount paid during such month pursuant to court orders effectively served under this section, other than such conflicting court orders) minus-

(I) the amount of disposable retired or retainer pay paid under clause (i); and

(II) the amount of disposable retired or retainer pay retained under clause (ii).

(B) The Secretary concerned shall hold the amount retained under clause (ii) of subparagraph (a) until such

time as that Secretary is provided with a court order which has been certified by the member and the spouse or former spouse to be valid and applicable to the retained amount. Upon being provided with such an order, the Secretary shall pay the retained amount in accordance with the order.

(4) (A) In the event of effective service of a court order under this section and the service of legal process pursuant to section 459 of the Social Security Act (42 U.S.C. 659), both of which provide for payments during a month from the same member, satisfaction of such court orders and legal

process from the retired or retainer pay of the member shall be satisfied on a first-come, first-served basis. Such court orders and legal process shall be satisfied out of moneys which are subject to such orders and legal process and which remain available in accordance with the limitations of paragraph (1) and subparagraph (B) of this paragraph during such month after the satisfaction of all court orders or legal process which have been previously served.

(B) Notwithstanding any other provision of law, the total amount of the disposable retired or retainer pay of a

member payable by the Secretary concerned under all court orders pursuant to this section and all legal processes pursuant to section 459 of the Social Security Act (42 U.S.C. 659) with respect to a member may not exceed 65 percent of the disposable retired or retainer pay payable to such member.

5. A court order which itself or because of previously served court orders provides for the payment of an amount which exceeds the amount of disposable retired or retainer pay available for payment because of the limit set forth in paragraph (1), or which, because of previously served

court orders or legal process previously served under section 459 of the Social Security Act (42 U.S.C. 659), provides for payment of an amount that exceeds the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4), shall not be considered to be irregular on its face solely for that reason. However, such order shall be considered to be fully satisfied for purposes of this seciton by the payment to the spouse or former spouse of the maximum amount of disposable retired or retainer pay permitted under paragraph (1) and subparagraph (B) of paragraph (4).

(6) Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired or retainer pay under this section have been made in the maximum amount permitted under paragraph (1) of subparagraph (B) of paragraph (4). Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in which the maximum amount permitted under paragraph (1) has been paid and under section 459 of the Social Security Act (42 U.S.C. 659) in any case in which

the maximum amount permitted under subparagrpah (B) of paragraph (4) has been paid.

(f) (1) The United States and any officer or employee of the United States shall not be liable with respect to any payment made from retired or retainer pay to any member, spouse, or former spouse pursuant to a court order that is regular on its face if such payment is made in accordance with this section and the regulations prescribed pursuant to subsection (h).

(2) An officer or employee of the United States who, under regulations prescribed pursuant to subsection (h), has the duty to respond to interrogatories shall not be subject under any law to any

disciplinary action or civil or criminal liability or penalty for, or because of, any disclosure of information made by him in carrying out any of his duties which directly or indirectly pertain to answering such interrogatories.

(g) A person receiving effective service of a court order under this section shall, as soon as possible, but not later than 30 days after the date on which effective service is made, send a written notice of such court order (together with a copy of such order) to the member affected by the court order at his last known address.

(h) The Secretaries concerned shall prescribe uniform regulations for the administration of this section.

(Added Pub.L. 97-252, Title X, § 1002(a), Sept. 8, 1982, 96 Stat. 730; as amended Pub.L. 98-525, 98 Stat. 2547; Pub.L. 99-261, 100 Stat. 3887; Pub.L. 100-26, 101 Stat. 273, 282; Pub.L 101-189, 103 Stat. 1462)

APPENDIX F

UNITED STATES CODE

PROVISIONS

TITLE 10 UNITED STATES CODE

GENERAL MILITARY LAW, SUBT. A

Ch. 1 DEFINITIONS

§ 101. Definitions

In addition to the definitions in sections 1-5 of Title 1, the following definitions apply in this title:...

(27) "Pay" includes basic pay, special pay, retainer pay, incentive pay, retired pay, and equivalent pay, but does not include allowances.

TITLE 29 UNITED STATES CODE

LABOR

Ch. 18 RETIREMENT INCOME SECURITY

§ 1002. Definitions

(32) The term "governmental plan"

means a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing. The term "governmental plan" also includes any plan to which the Railraod Retirement Act of 1835 or 1937 [45 U.S.C.A. § 231 et seq.] applies, and which is financed by contributions required under that Act and any plan of an international organization which is exempt from taxation under the provisions of the International Organizations Immunities Act [22 U.S.C.A. § 288 et seq.].

§ 1003. Coverage

(a) Except as provided in subsection (b)

of this section and in sections 1051, 1081, and 1101 of this title, this subchapter shall apply to any employee benefit plan if it is established or maintained -

(1) by any employer engaged in commerce or in any industry or activity affecting commerce; or

(2) by any employee organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or

(3) by both.

(b) The provisions of this subchapter shall not apply to any employee benefit plan if -

(1) such plan is a governmental plan (as defined in section 1002(32) of this title);

(2) such plan is a church plan (as defined in section 1002(33) of this

title) with respect to which no election has been made under section 410(d) of Title 26;

(3) such plan is maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws.

APPENDIX G

REVISED CODE OF WASHINGTON PROVISIONS

TITLE 6 REVISED CODE OF WASHINGTON

ENFORCEMENT OF JUDGMENTS

CH. 15 PERSONAL PROPERTY EXEMPTIONS

6.15.020. Pension money exempt - Exceptions

(1) Unless otherwise provided by federal law, any money received by any citizen of the state of Washington as a pension from the government of the United States, whether the same be in the actual possession of such person or be deposited or loaned, shall be exempt from execution, attachment, garnishment, or seizure by or under any legal process whatever, and when a detor dies, or absconds, and leaves his or her family any money exempted by this section, the same shall be exempt to the family as provided in this section. This section shall not apply to child support collection actions issued under chapter

26.18, 26.23, or 74.20A RCW, if otherwise permitted by federal law.

(2) The right of a person to a pension, annuity, or retirement allowance or disability allowance, or death benefits, or any optional benefit, or any other right accrued or accruing to any citizen of the state of Washington under any employee benefit plan, and any fund created by such a plan or arrangement, shall be exempt from execution, attachment, or seizure by or under any legal process whatever. This subsection shall not apply to child support collection actions issued under chapter 26.18, 26.23, or 74.20A RCW if otherwise permitted by federal law. This subsection shall permit benefits under any such plan or arrangement to be payable to a spouse, former spouse, child, or other dependent of a

participant in such plan to the extent expressly provided for in a qualified domestic relations order (as such term is defined in section 206(d) of the federal employee retirement income security act of 1974, as amended, 29 U.S.C. Sec. 1056(d) or in section 401(a)(13) of the internal revenue code of 1954, as amended).

(3) For the purposes of this section, the term "employee benefit plan" means any plan or arrangement that is subject to the provisions of the federal employee retirement income security act of 1974, as amended, 29 U.S.C. Secs. 1001 through 1461 or that is described in sections 401(a), 403(a), 403(b), 408, or 409 (as in effect before January 1, 1984) of the internal revenue code of 1954, as amended, or both. The term "employee benefit plan" shall not include any

employee benefit plan that is excluded from the application of the federal employee retirement income security act of 1974, as amended, pursuant to section 4(b)(1) of that act, 29 U.S.C. Sec. 1003(b)(1).

Formerly section 6.16.030, amended by Laws 1987, ch. 64, section 1. Recodified as section 6.15.020 and amended by Laws 1987, ch. 442, sections 302, 1121. Reenacted and amended by Laws 1988, ch. 231, section 6, eff. March 23, 1988. Amended by Laws 1989, ch. 360, section 21.

TITLE 6 REVISED CODE OF WASHINGTON

ENFORCEMENT OF JUDGMENTS

CH. 16 PERSONAL EXEMPTIONS

6.16.030. Pension money exempt.

Any money received by any citizen of the state of Washington as a pension from the government of the United States, whether the same be in the actual possession of such person or be deposited or loaned by him, shall be exempt from execution, attachment or seizure by or under any legal process whatever.

Enacted laws 1890 p 88, sec. 1

TITLE 26 REVISED CODE OF WASHINGTON

DOMESTIC RELATIONS

CH. 16 HUSBAND AND WIFE

26.16.140. Earnings and accumulations of husband and wife living apart, minor children

When a husband and wife are living separate and apart, their respective earnings and accumulations shall be the separate property of each. The earnings and accumulations of minor children shall be the separate property of the spouse who has their custody or, if no custody award has been made, then the separate property of the spouse with whom said children are living.

Enacted by Code 1881, section 2413. Amended by Laws 1972, Ex.Sess., ch. 108, section 5.

APPENDIX H

UNITED STATES CONSTITUTIONAL PROVISIONS

CONSTITUTION OF THE UNTITED STATES

ARTICLE I

SECTION 8 POWERS OF CONGRESS

Section 8. The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix

the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progrss of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but

no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation

in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; - And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

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CONSTITUTION OF THE UNTITED STATES

ARTICLE III

SECTION 2 JURISDICTION

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; - to all Cases affecting Ambassadors, other public Ministers, and Consuls; - to all Cases of admiralty and maritime Jurisdiction; - to Controversies to which the United States shall be a Party; - to Controversies between two or more States; - between a State and Citizens of another State; - between citizens of different States; - between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and

foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

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CONSTITUTION OF THE UNTITED STATES

AMENDMENT XIII

SECTION 1 SLAVERY ABOLISHED

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

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